HOLIDAY INN KUCHING

v.

ELIZABETH LEE CHAI SIOK

HIGH COURT BORNEO
HAIDAR MOHD. NOOR J
[ORIGINATING MOTION NO. KG 21 OF 1990]
18 OCTOBER 1991

LABOUR LAW: *Dismissal - Whether constructive dismissal - Whether Industrial Court erred in law - Respondent not seeking reinstatement - Whether Industrial Court can award damages or compensation in lieu of reinstatement - Jurisdiction of Industrial Court - Elements of representation for reinstatement under s. 20 IRA - Meaning of 'dismiss' - Contract test - Unreasonable test - Industrial Relations Act 1967, ss. 20(1), (3), 30(1), 33A, 33B(1).*

The respondent was engaged as a personal administrative assistant to the general manager, Holiday Inn Kuching (the applicant). She alleged that she was constructively dismissed and claimed that she wrote a resignation letter as demanded by the general manager. The respondent is presently employed with the Kuching Hilton.

The dispute in relation to her dismissal was referred to the Industrial Court under s. 20(3) of the Industrial Relations Act 1967 (the IRA). Although the respondent initially sought reinstatement, she later sought damages in lieu of reinstatement. The Court awarded her backwages and compensation in lieu of reinstatement for her dismissal which was held to be without just cause or excuse.

This was the applicant's *certiorari* application to quash the said award. The applicant contended that the Industrial Court erred in law in proceeding to find that the respondent had been dismissed when it had decided that there was no constructive dismissal; accordingly the Industrial Court had erred in assuming jurisdiction of the matter.

It was further argued that the Industrial Court had no jurisdiction to award compensation in lieu of reinstatement as the respondent did not seek reinstatement with the applicant because she was already gainfully employed.

Held:

[1] The representations by the Minister to the Industrial Court under s. 20(3) of the IRA must necessarily confine to representations for reinstatement by virtue of s. 20(1). The power to make an award by the Industrial Court is provided by s. 30(1). It would clearly appear therefore that if a workman does not require reinstatement, there would not be a reference to the Industrial Court under s. 20(3) of the IRA.

[2] The Industrial Court in spite of accepting the contract test went on to hold that the respondent "has been able to establish, on balance of probabilities, that there has been a dismissal". It would appear from the judgment of the learned Chairman of the Industrial Court that such a finding was based on unfairness and unreasonableness of the conduct of the general manager.

[3] The learned Chairman after accepting that the contract test was the proper test to consider and that it was not applicable in the present case, appeared to hold the "unreasonableness test" as the basis of the respondent's dismissal even though "unreasonableness test" was rejected by the Supreme Court in *Wong Chee Hong's* case.

[4] The decision of the Industrial Court on the alleged dismissal was absurd. As the Court had ruled that there was no constructive dismissal, the logical and rational effect of such a finding would be that it no longer had any jurisdiction to deal with the matter. In wrongly deciding that there was a dismissal based upon the 'unreasonableness test', the Industrial Court committed an error of law which goes to its jurisdiction because if it had applied the correct contract test there would have been 'no constructive dismissal' and as such the Industrial Court would have no jurisdiction to act.

[5] The respondent clearly could not come within the provision of s. 20(1) and (3) of the IRA as the Legislature intended that recourse to the Industrial Court is only in respect of reinstatement and once reinstatement is no longer applied for the Industrial Court ceases to have jurisdiction. In this case, as the respondent did not want her job back as she is now gainfully employed, there was no basis for awarding damages or compensation in lieu of reinstatement. The award of the Industrial Court was accordingly quashed.

[Applicant's order for certiorari granted.]

Cases referred to:
Dr. A. Dutt v. Assunta Hospital [1980] 1 MLJ 304 ***(foll)***
Wong Chee Hong v. Cathay Organisation (M) Sdn. Bhd. [1988] 1 CLJ (Rep) 298 ***(foll)***
Malayan Banking Bhd. v. Association of Bank Officers Peninsular Malaysia & Anor. [1988] 1 CLJ (Rep) 183 ***(cit)***
Enesty Sdn. Bhd. v. Transport Workers' Union & Anor. [1986] 1 MLJ 18 ***(cons)***
Anisminic v. Foreign Compensation Commission [1969] 1 All ER 233 ***(foll)***

Legislation referred to:
Industrial Relations Act 1967, ss. 20(1), 20(3), 30(1), 33A

For the applicant - J.C. Fong; M/s. Reddi & Co.
For the respondent - Sunny Si (Francis Wee with him); M/s. Si & Wee

JUDGMENT

Haidar Mohd. Noor J:

On 23 May 1991 the applicant, Holiday Inn Kuching was granted leave to apply for an order of *certiorari* to remove into the Court for the purpose of being quashed the Industrial Court Award No. 255 of 1990 ([1990] 2 ILR 262) dated 25 September 1990 given in Industrial Court Case No. 1:4/4 - 325/87.

The award was for the sum of RM49,005 in respect of backwages and compensation in lieu of reinstatement to the respondent, Elizabeth Lee Chai Siok after making a 40% deduction for her contributory conduct for her dismissal without just cause or excuse by the applicant as ruled by the Industrial Court. The award was however, subject to the usual income tax deductions and EPF contributions, if any.

At the outset of the hearing, Counsel for the respondent raised a preliminary objection on the applicant's application on the ground that the applicant had filed an application before the Industrial Court under s. 33A of the Industrial Relations Act 1967 (IRA) to refer a question of law to the High Court and such application is still pending and the present application before this Court is substantially on the same issue and as such it should be viewed as an attempt by the applicant to abuse the process of the Court. J.C Fong, Counsel for the applicant expressed surprise as he was not duly informed of the preliminary objection raised. However, he requested for an adjournment to get instructions from his client. Francis Wee, Counsel for the respondent had no objection and I adjourned the hearing to 4 September 1991.

On 4 September 1991 J.C Fong informed the Court that his client wished to proceed solely with the present *certiorari* application and his client will discontinue the application pending before the Industrial Court. In fact he had earlier notified the Court and the respondent's Counsel of his client's intention *vide* letter dated 2 September 1991. Francis Wee, Counsel for the respondent indicated that in the circumstances he would not pursue the preliminary objection raised in the earlier hearing. I then directed this originating motion to proceed.

From the tone of the submission of J.C Fong, Counsel for the applicant, in comparison to the grounds put forth in the statement filed, the principal grounds relied on to quash the award of the Industrial Court are:

(1) The Industrial Court having found that there was no constructive dismissal as alleged by the respondent has erred in law in proceeding to find that the respondent had on a balance of probabilities been dismissed.

(2) The Industrial Court erred in law in finding that the respondent was dismissed and accordingly erred in assuming jurisdiction of the matter and thereby committing an error as to its jurisdiction.

(3) The Industrial Court has in breach of natural justice, failed to hear and/or consider the points raised by the applicant that:

(i) The Industrial Court had no longer any jurisdiction to determine the dispute referred to it when the respondent gave evidence that she wanted to continue on working for her present employer (Hilton Hotel), that is, she did not want reinstatement to employment with the applicant.

(ii) There was no jurisdiction for the Industrial Court to grant compensation in lieu of reinstatement in view of the fact that the respondent did not want reinstatement.

(4) The Industrial Court in ignoring, failing to hear and/or consider the points mentioned in para. 3 above has further failed to take into account relevant considerations, and has acted unreasonably and accordingly has exceeded its jurisdiction.

(5) The Industrial Court has committed errors of law affecting its jurisdiction when it continued to assert its jurisdiction when the respondent did not want reinstatement.

(6) The Industrial Court has acted without or has exceeded its jurisdiction in making the award dated 25 September 1990.

Before proceeding to consider the grounds put forth, it may be useful to set out the pertinent facts which would appear to be not in dispute. They are:

(a) The respondent was until 9 January 1987, engaged as a personal administrative assistant to the general manager, Holiday Inn Kuching (see para. 5 of the statement of case - Exh. A to Peter Muller's affidavit dated 3 November 1990.)

(b) On 9 January 1987 she addressed a letter to the General Manager, Holiday Inn Kuching stating that, as demanded, she submitted her letter of resignation (see para. 15 of the statement of case). The applicant did not issue the respondent with a letter of dismissal.

(c) The respondent referred the matter under s. 20(1) of IRA to the Director General's office at Kuching for reconciliation alleging that she was constructively dismissed from her post.

(d) The matter of her dismissal was then referred to the Industrial Court under s. 20(3) of IRA.

(e) The respondent is now gainfully employed with the Hilton Hotel, Kuching. She had worked there since 1 March 1988.

(f) In the course of the hearing before the Industrial Court, the respondent gave evidence to the effect that she was gainfully employed with the Hilton Hotel, Kuching and would like to continue working there (see p. 21 of Exh. SCH1 to encl. 5)

(g) Her basic salary at the Hilton Hotel, Kuching was RM2,380 per month compared with a basic salary of RM2,200 per month at the Holiday Inn Kuching.

(h) By para. 16 of the statement of case, it is clear that the respondent's claim was on the basis of constructive dismissal.

Jurisdiction of the Industrial Court

The powers of the Industrial Court in relation to dismissal are set out in s. 20(1) and (3) of IRA.

Section 20(1) and (3) read:

> 20(1) **Where a workman** irrespective of whether he is a member of a trade union or otherwise **considers that he has been dismissed without just cause or excuse by his employer, he may make representations in writing to the Director General to be reinstated in his former employment;** the representations may be filed at the office of the Director General nearest to the place of employment from which the workman was dismissed.
>
> (3) Upon receiving the notification of the Director General under subsection (2), the Minister may, if he thinks fit, **refer the representations to the Court for an award.** (Emphasis added)

The elements of representations would appear to be as follows:

(i) the respondent must be a workman (see *Dr. A Dutt v. Assunta Hospital* [1980] 1 MLJ 304).

(ii) whether there was a dismissal and if so, it must be without just cause or excuse by his employer (see *Wong Chee Hong v. Cathay Organisation (M) Sdn. Bhd.* [1988] 1 CLJ (Rep) 298).

(iii) the workman has made "representations in writing" to be "reinstated in his former employment".

The representations by the Minister to the Industrial Court under s. 20(3) of IRA must necessarily **confine to representations for reinstatement** by virtue of s. 20(1) of IRA. The power to make an award by the Industrial Court is provided by s. 30(1) of IRA and reads:

> The Court shall have power in relation to a trade dispute referred to it **or in relation to a reference to it under s. 20(3)**, to make an award (including an interim award) relating to all or any of the issues. (Emphasis added)

It would clearly appear therefore that if a workman does not require reinstatement, there would not be reference to the Industrial Court under s. 20(3) of IRA.

Element (i) and so far as at the date of representations to the Industrial Court, element (iii) as well seem to be satisfied. The initial issue that needs consideration is whether element (ii), that is, whether the respondent has been dismissed or to use the phrase used by the respondent "constructively dismissed".

Issue of Constructive Dismissal

(Grounds 1 and 2)

As I said earlier it is not disputed that the applicant did not terminate her service as such but she claimed that she wrote the resignation letter **as demanded by Peter Muller,** the General Manager of the applicant and thereby contended that the resignation letter was "involuntarily written". In the result she claimed that she was "constructively dismissed" and this was the basis of her representations.

The word "dismiss" is not defined in IRA and the Supreme Court in *Wong Chee Hong's* case, at p. 302 touching on the word "constructive dismissal" advised:

> Perhaps in the context of our law, it is better that we do not use the terminology at all.

Be that as it may, *Wong Chee Hong's* case, decided that the test to determine whether there was "a dismissal" within the meaning of s. 20(1) of IRA "could not go beyond the common law test". The Supreme Court said that when the Industrial Court is dealing with a reference under s. 20, the first thing that the Court will have to do is to ask itself a question whether there was a dismissal, and if so, whether it was with or without just cause or excuse. In determining the issue of dismissal the Supreme Court in *Wong Chee Hong's* case said that the test for "constructive dismissal" is the contract test and rejected the "unreasonableness test". It would seem clear that the respondent's Counsel as well as the learned Chairman of the Industrial Court agreed on the 'contract test' (see p. 7 to Exh. 'C1' of Peter Muller's affidavit and p. 30 of the award). Nevertheless the Industrial Court in spite of accepting the contract test went on to hold that the respondent "has been able to establish, on balance of probabilities, that there has been a dismissal". It would appear from the judgment of the learned Chairman of the Industrial Court that such a finding was based on unfairness and unreasonableness of the conduct of Peter Muller. At p. 30 of the award the learned Chairman admitted that the applicant was not in breach of contract *per se* but Peter Muller's actions had generated, contributed and/or aggravated the stress and tension in the working environment of the respondent. Clearly, in my view the learned Chairman after accepting that the contract test as the proper test to consider and not applicable in the present case, appeared to hold the "unreasonableness test" as the basis of the respondent's dismissal even though "unreasonableness test" was rejected by the Supreme Court in *Wong Chee Hong's* case. With due respect, it would appear that the decision of the Industrial Court on 'the dismissal' was absurd or reached absurdly. It appeared to be devoid of plausible justification and clearly perverse because the case before the Industrial Court was not one of "simple dismissal" (see *Malayan Banking Bhd. v. Association of Bank Officers, Peninsular Malaysia & Anor.* [1988] 1 CLJ (Rep) 183). As the Industrial Court ruled that there was no constructive dismissal, the logical and rational effect of such a finding would be that there was no longer any jurisdiction for it to deal with the matter. If the facts clearly disclosed that there was constructive dismissal based on the contract test as propounded by the Supreme Court in *Wong Chee Hong's* case, in my view the respondent need not even tender the alleged resignation letter but can simply walk out as in the case of *Wong Chee Hong.* However, the facts in this case do not seem to support such a case.

In my view, in wrongly deciding that there was a dismissal based upon the "unreasonableness test", the Industrial Court committed an error of law which goes to its jurisdiction because if it had applied the correct contract test there would have been 'no constructive dismissal' and as such the Industrial Court would have no jurisdiction to act. In this respect, Mohamed Azmi SCJ delivering the judgment of the Supreme Court in *Enesty Sdn. Bhd. v. Transport Workers' Union & Anor.* [1986] 1 MLJ 18 said:

> There is no degree of nullity and if there is an error of law on which the Industrial Court's award depends, the remedy of *certiorari* should not be excluded by s. 33B(1). In other words, if there is an error of law on which the award of the Industrial Court is founded, such error whether of interpretation or otherwise must necessarily be without jurisdiction or in excess of jurisdiction. Any decision in any award based on an invalid interpretation or construction of the law must surely be a nullity, and this must be construed as a nullity resulting from the Industrial Court doing or failing "to do something in the course of the inquiry which is of such a nature that its decision is a nullity" as referred to by Lord Reid at p. 171 in *Anisminic's* case, or the Court "having asked themselves the wrong question" as referred to by Lord Diplock at p. 187 in *In re Racal Communications Ltd.*

On these two grounds alone I will have no hesitation in allowing the applicant's application and quash the award accordingly.

Issue of damages/compensation in lieu of reinstatement

(Grounds 3(i), (ii), 4, 5 and 6)

These grounds can be conveniently dealt with together. It is essentially on the issue of reinstatement. As stated by me earlier the respondent in her representations initially wanted reinstatement which is in accordance with s. 20(1) of IRA but subsequently in the hearing before the Industrial Court she changed her stand and instead asked for damages in lieu of reinstatement. In such a situation can the Industrial Court consider this aspect of her claim? In my view the respondent clearly could not come within the provisions of s. 20(1) and (3) of IRA as the legislature intended that recourse to the Industrial Court is only in respect of reinstatement and once reinstatement is no longer applied for the Industrial Court ceases to have any more jurisdiction. According to the case of *Dr. A. Dutt*:

> the right to compensation must be an issue in representations for reinstatement and necessarily arises where the Court would not order reinstatement.

In the case here the issue in representations for reinstatement no longer arises as the respondent clearly abandoned reinstatement in the course of the hearing before the Industrial Court. According to Chang Min Tat FJ in *Dr. A. Dutt's* case at p. 304:

> **If a workman complains he has been dismissed without just cause or excuse,** it does mean that he is dissatisfied with his dismissal or termination of services and **he wants his job back.** However there may exist circumstances and reasons why reinstatement should not be ordered. (Emphasis added)

In other words, for compensation for reinstatement to arise:

(i) the workman must "want his job back"; and

(ii) although the workman wants his job back, the Industrial Court would not order reinstatement.

In this case, the respondent clearly did not want her job back as she is now gainfully employed by Hilton, Kuching. Thus there is no basis for awarding damages or compensation in lieu of reinstatement. As I said earlier the right to compensation must be an issue in representations for reinstatement. It would appear therefore that the Industrial Court made an error of law affecting its jurisdiction as up to the time of the award, there was no longer representations for reinstatement. Lack of jurisdiction may arise in various ways and this is what Lord Reid said in *Anisminic v. Foreign Compensation Commission* [1969] 1 All ER at p. 233:

> There may be an absence of those formalities or things which are conditions precedent to the tribunal having any jurisdiction to embark on an enquiry. **Or the tribunal may at the end make an order that it has no jurisdiction to make**. Or in the intervening stage, while engaged on a proper enquiry, the tribunal may depart from the rules of natural justice; or it may ask itself the wrong questions; or it may take into account matters which it was not directed to take into account. Thereby it would step outside its jurisdiction. It would turn its enquiry into something not directed by Parliament and fail to make the enquiry which Parliament did direct. Any of these things would cause its purported decision to be a nullity. Further it is assumed, unless special provisions provide otherwise, that the tribunal will make its enquiry and decision according to the law of the land. For that reason the Courts will intervene when it is manifest from the record that the tribunal, though keeping within its mandated area of jurisdiction, comes to an erroneous decision through an error of law. In such a case the Courts have intervened to correct the error. (Emphasis added)

In the circumstances of the case the Industrial Court no longer has jurisdiction to make an award on damages or compensation for reinstatement under s. 30(1) of IRA as the respondent clearly did not want her job back with the applicant. The award of the Industrial Court would accordingly be quashed.

For the reasons set out by me I allow the application for an order of *certiorari* by the applicant with costs to be taxed unless agreed.

Also found at [1992] 1 CLJ 141